Filed 3/22/19 Swim 'N Sport Retail, Inc. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

SWIM 'N SPORT RETAIL, INC., Plaintiff and Appellant, v. RETAIL PRO INTERNATIONAL, LLC, Defendant and Respondent.	C080167 (Super. Ct. No. 34-2013-00154404CUBCGDS)

The buyer of allegedly defective computer software, plaintiff Swim 'N Sport Retail, Inc. (SNS), appeals from a judgment of dismissal of its second amended complaint after the trial court sustained a demurrer by the seller, defendant Retail Pro International LLC (RPI), on statute of limitations grounds. (Com. Code, § 2725 [four-year limitations period for breach of contract for sales], hereafter § 2725.) The software, installed by RPI's alleged business partner in early 2009, never functioned properly, yet plaintiff did not file this lawsuit against RPI until November 8, 2013. SNS argues its

cause of action did not accrue, or the limitations period should be tolled, until RPI's final failed attempt to fix the software on November 9, 2009. We affirm the judgment.

FACTS AND PROCEEDINGS

For purposes of reviewing a dismissal following demurrer, we treat the demurrer as admitting all material facts properly pleaded, but we do not assume the truth of the complaint's contentions, deductions or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967 (*Aubry*).)

As plaintiff states in its appellate brief: "This case stems from the sale of defective point-of-sale software by RPI and its attempted installation by RPI's business partner, POSabilities (POS)." Plaintiff thus abandons on appeal the argument rejected by the trial court, that plaintiff's contract with RPI was a contract for services, not sale of goods. POS, a Florida corporation, is not a party to this appeal, and its dispute with plaintiff was litigated in a Florida court.

Plaintiff is a retailer of swimwear and sportswear in multiple states and currently maintains 33 retail stores. For several years before 2008, plaintiff used point-of-sale software it bought from RPI (Retail Pro Version 8) to record sales, keep inventory, and track profits. RPI contracted with POS to distribute, install, and service the software RPI sold to customers such as plaintiff.

In early 2008, POS informed plaintiff that RPI would stop selling Version 8 after 2009 and would cease providing support for Version 8 after 2011.

On October 21, 2008, plaintiff executed an End User License Agreement (EULA) with RPI allowing plaintiff to upgrade to Version 9 of RPI's retail software. The EULA required RPI to deliver the software to plaintiff, but specified that RPI was not responsible for "[i]nstallation, training and support services." RPI later decided to continue supporting Version 8 but failed to inform plaintiff, and plaintiff discovered on July 3, 2009, that it never needed to upgrade to Version 9.

The conversion to Version 9 started in November 2008, and installation by POS took about three months. According to plaintiff's complaint, the software *never* worked properly. The pleading alleges that "At the very beginning of the upgrade process, it became readily apparent that the upgrade would be anything but seamless. Among other critical issues, inventory reports were wholly inaccurate and corrupted; sales were not being recorded accurately; theft reports per location could not be evaluated; and it otherwise was impossible to generate reports on inventory, sales, vendor transactions, financial reporting, associate performance, and other critical operations reporting information that SNS had received for years from Version 8 that were vital to running SNS's business." SNS was forced to hire people to hand count items for inventory. Version 9 was slow; some stores experienced an inability to open cash draws upon a sale; checks were not being processed; gift cards could not be activated; biometric readers did not function; sales taxes were not accurately computed; and credit cards were processed without approval codes.

There were multiple attempts to fix the problems, but without success.

No later than May 5, 2009, plaintiff documented its complaints to RPI: "After many months of problems with Version 9 software that was disrupting operations at SNS, SNS wrote to both RPI's business partner and RPI a letter on May 5, 2009, addressing the devastating problems with the subject conversion." "That same day, SNS communicated by phone and by e-mail with RPI about the myriad problems with the upgrade and with Version 9."

"During the time that the conversion to Version 9 began [November 2008] through November 9, 2009, SNS relied upon the words and actions of POS and RPI that repairs, fixes, patches and solutions would be forthcoming to Version 9 such that the time and expense that had been incurred by SNS would all pan out and that Version 9 would provide seamless transactions and reports required by SNS. As a result of such

representations, SNS did not seek other alternative providers for point of sale software, and has been damaged . . . ."

"Finally, on November 10, 2009, after dozens of meetings and teleconferences between RPI, RPI's business partner and SNS personnel for the purpose of attempting to resolve Version 9's myriad problems and enduring multiple fixes and patches, RPI's business partner (POS), with the acquiescence and approval of RPI, told SNS to revert back to Version 8 of the Retail Pro software because the problems with Version 9 were not capable of resolution." The complaint alleges this was "the first time that anyone advised . . . that RPI could not provide a product for [SNS's] purposes . . . ." The reversion took place between February 2010 and March 2010.

The unsuccessful conversion cost plaintiff thousands of dollars in costs, time lost, and profits lost.

On July 8, 2010, SNS sued both RPI and POS in Florida state court, case No. 10-37557, for fraud in the inducement, damages under the Florida Deceptive and Unfair Trade Practices Act, breach of contract against POS under the parties' installation and servicing agreement, and a claim for injunctive relief to prohibit RPI from taking any action to prevent SNS from continuing to use Version 8 past July 31, 2010.

On March 24, 2011, the Florida court granted RPI's motion to dismiss the Florida complaint against RPI on the ground of improper venue, because the EULA's forum selection clause made California the exclusive jurisdiction for the dispute.

SNS's Florida lawsuit continued as against POS. On our own motion, we take judicial notice of a May 31, 2018, unpublished order of the Florida Court of Appeal, naming SNS as appellant and POS as cross-appellant, and stating: "ORDERED that the joint stipulation of dismissal of appeals is recognized by the Court, and these consolidated appeals from the Circuit Court for Miami-Dade County, Florida are hereby dismissed." (*Swim 'N Sport Retail, Inc. v. POSabilities, Inc*., 2018 WL 2715255, case Nos. 3D17-1705 and 3D17-2220.) The Florida disposition is not of substantial

consequence to our determination of this appeal. (Evid. Code, § 452, subd. (d) [permissive judicial notice of records of any state court], § 459 [parties shall be afforded opportunity to challenge judicial notice if matter is of substantial consequence to determination of appeal].)

Although the Florida court dismissed RPI in March 2011, plaintiff did not file this California lawsuit against RPI until November 8, 2013. The trial court twice sustained RPI's demurrers but gave plaintiff leave to amend.

The operative pleading is plaintiff's Second Amended Complaint, filed on March 25, 2015. It alleges two causes of action: (1) breach of contract, and (2) declaratory relief that the EULA's "Limitation of Liability and Remedy" clause is unconscionable.

The breach of contract claim alleges that RPI breached the 2008 EULA with plaintiff "by failing to provide a product that was free from defect and had significant bugs and performance problems" that RPI did not remedy despite many attempts by RPI and its business partner POS. "It was not until November 10, 2009, that SNS was advised that RPI and POS were not able to provide a product free from defect and to go back to the Version 8." RPI breached the agreement by failing to replace the defective software, failing to implement appropriate corrections and repairs, and failing to remedy the defects.

The declaratory relief cause of action alleges that RPI claims the EULA's "Limitation of Liability and Remedy" clause prohibits recovery of direct, indirect, special, incidental, and consequential damages arising from use of Version 9 software. Plaintiff denies that the clause prohibits such recovery and instead claims the provision is invalid because it is unconscionable for multiple reasons, e.g., the EULA is on a preprinted form that was presented to plaintiff in a "take it or leave [it] fashion" without negotiation; it is a contract of adhesion; RPI was in a superior bargaining position; and it is commercially unreasonable.

RPI demurred on the ground the entire complaint was barred by the four-year statute of limitations of section 2725, which provides the cause of action accrues "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

Plaintiff filed an untimely opposition (which the trial court nevertheless considered), arguing the limitations period was governed by the four-year statute (Code Civ. Proc., § 337) for breach of contract or breach of express warranty, but even if the four-year period of the Commercial Code (§ 2725) applies, in either case the limitations period did not commence until November 10, 2009, when RPI gave up trying to fix the problems, such that defendant's November 8, 2013, complaint was filed just under the wire. Plaintiff argued the accrual date was tolled while RPI was attempting to fix the problems and while the Florida lawsuit was pending against RPI.

The trial court concluded the action was barred by section 2725, and plaintiff failed to allege any facts for equitable tolling or any way to cure the pleading by amendment. Plaintiff filed suit in the wrong forum (Florida), forcing RPI to move for dismissal, and then waited nearly 30 months to file suit in California, yet plaintiff could easily have filed suit in California long before any limitations issue arose. The court sustained RPI's demurrer without leave to amend and entered judgment dismissing the complaint with prejudice.

DISCUSSION

I

Standard of Review

A statute of limitations generally raises questions of fact but can be decided as a matter of law where reasonable minds could reach only one conclusion on undisputed facts. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810.)

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. . . .' However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry, supra*, 2 Cal.4th at pp. 966-967.) The burden is on the appellant to show a reasonable possibility of curing a defect. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

II

Overview

Plaintiff argues it had four years to file suit after RPI gave up trying to fix the problems in November 2009. Although the complaint alleges only breach of contract, plaintiff presents arguments about breach of warranty, with no discussion or analysis of the distinction. (E.g., *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 135 (*Cardinal*).)

As to the breach of warranty, plaintiff has three theories:

1. A new breach of warranty occurred with each failed attempt to fix the software problems (the error correction theory);

2. The cause of action did not accrue until plaintiff learned that RPI gave up (the future performance theory); and

3. The limitations period was equitably tolled during the attempted repairs (the tolling for repairs theory).

RPI asks us to ignore the first two arguments because plaintiff forfeited them by not presenting them to the trial court, and the complaint does not allege breach of warranty or the specific nature of any repair attempts.

On appeal following demurrer, a plaintiff may propose new facts and new theories for the first time on appeal to show that a complaint can be amended to state a cause of action, as long as the plaintiff does not stray from the central factual claims of the complaint. (*Connerly v. State of California* (2014) 229 Cal.App.4th 457, 460, 463-464; accord, *King v. CompPartners, Inc*. (2018) 5 Cal.5th 1039, 1049, fn. 2.)

While plaintiff's new theories arguably stray from the complaint's central claims, we will nevertheless consider them, because a breach of contract action may be based on a breach of warranty. (*Cardinal, supra*, 169 Cal.App.4th at p. 135.) We explain plaintiff fails to offer any theory that will avoid the limitations problem.

III

Section 2725

Section 2725 has different accrual dates for breach of contract and some breaches of express warranty. Under section 2725, "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . . [¶] A *cause of action accrues* when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is

made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the *cause of action accrues* when the breach is or should have been discovered." (Italics added.) Section 2725 "does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this code becomes effective." (§ 2725, added by Stats. 1967, ch. 799, § 5, p. 2207.)

Section 2725, which is in accord with the four-year limitations period for contracts generally (Code Civ. Proc., § 337), is similar to the Uniform Commercial Code and was added to the California Code to provide a uniform limitations period for sales contracts for concerns doing business on a nationwide scale. (Vol. 23A, Part 2, West's Annotated California Codes, Com. Code, § 2725, p. 155, Historical and Statutory Notes to § 2725, and Uniform Commercial Code Comment, p. 155; see also, *Krieger v. Nick Alexander Imports, Inc*. (1991) 234 Cal.App.3d 205, 215, fn. 5 [legislative history] (*Krieger*).)

IV

Accrual for Breach of Contract

The four-year limitations period for plaintiff's cause of action for breach of contract accrued "when the breach occur[red]." (§ 2725.) A breach occurs when there is an unjustified failure to perform a material contractual obligation when performance is due. (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 514 & fn. 3.)

Here, SNS initiated this California lawsuit on November 8, 2013. But RPI delivered the software in November 2008, and its installation was completed in three months, i.e., early 2009. The software *never* worked properly, and SNS knew all along that the software was not working properly despite multiple attempts to fix it. Even assuming for the sake of argument that accrual could be delayed until plaintiff suffered damages (but see, *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 826, 830-

832 [generally, accrual of cause of action for breach of contract does not await damages]), SNS knew all along that it was sustaining damages due to the software.

Thus, the cause of action accrued in early 2009, and plaintiff's complaint filed in November 2013 was too late.

Plaintiff claims it successfully avoids demurrer by not alleging a precise date of breach in its complaint. However, the complaint proves the cause of action definitely accrued no later than May 5, 2009, when plaintiff documented the ongoing problems in a letter, phone call, and e-mail to RPI. The November 2013 lawsuit was filed more than four years after May 5, 2009.

Plaintiff also argues the standard of review requires us to accept as true plaintiff's "factual" allegation that it was unaware of RPI's inability to provide a defect-free product until November 10, 2009, when RPI gave up. However, to the extent plaintiff argues the cause of action did not accrue until plaintiff knew a defect-free product was "impossible," plaintiff fails to cite any authority setting forth such a standard. To the extent plaintiff hopes to benefit from some theory of delayed discovery, the alleged unawareness renders the complaint defective on its face, because the complaint also alleges that plaintiff knew all along the software was not working properly and repeated attempts to fix it had failed. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318 [court reads the complaint as a whole and its parts in their context].) Having already alleged such knowledge, plaintiff could not (and does not seek to) cure the defect by an amended complaint deleting such allegations. (*Reichert v. General Ins. Co*. (1968) 68 Cal.2d 822, 836 [defect created by allegations in a verified or unverified complaint cannot be cured by simply omitting such allegations in an amended complaint without explanation such as mistake or inadvertence]; *Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 768-769.) We separately address, *post*, plaintiff's argument that knowledge of "impossibility" would be relevant to breach of warranty or equitable tolling.

The pendency of the Florida lawsuit against RPI did not delay the running of the California statute of limitations under an equitable tolling theory. Equitable tolling suspends the statute of limitations where a plaintiff has several alternative remedies, makes a good faith and reasonable decision to pursue one remedy, and it later becomes necessary to pursue the other. (*McDonald v. Antelope Valley Community College Dist*. (2008) 45 Cal.4th 88, 99-100.) Here, the Florida lawsuit was not an available remedy for SNS, and it was neither reasonable nor in good faith for SNS to sue RPI in Florida, because SNS's contract with RPI contained a forum selection clause making California the exclusive jurisdiction for the dispute.

Plaintiff cites inapposite cases that a plaintiff without specialized knowledge may be excused from discovering a breach because he relied on the expertise of a defendant with specialized knowledge. (*Seelenfreund v. Terminex of Northern California* (1978) 84 Cal.App.3d 133, 138-139 [customer had no reason to doubt termite inspector's false report that no termites were present].) In *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1032, the franchisor's discovery of the breach was hindered by the defendant's misrepresentations and fraud in his franchise application which were difficult for El Pollo Loco to detect. *NBCUniversal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, held that the plaintiffs, who claimed the defendants had stolen their concept for a television show, did not plead facts justifying delayed discovery by their failure to see the initial broadcast of the defendant's show, because they were on inquiry notice that their concept for a television show was being used by the defendants before the broadcast.

Here, it did not take specialized knowledge to discern the software was not functioning and the attempted repairs were not working.

As noted by defendant, plaintiff's argument is similar to one rejected in a different context in *Tin Tin Corp. v. Pacific Rim Park, LLC* (2009) 170 Cal.App.4th 1220, where a commercial tenant breached its lease to complete certain improvements by March 2000. When the landlord said the tenant was in breach, the tenant promised to make the

improvements by December 31, 2003, but failed to do so. (*Id*. at p. 1232.) The landlord was aware that the tenant had not even started the project by the end of 2003. The landlord filed suit in December 2005. The court concluded it was time-barred, because the limitations period began to run on the date of the breach in March 2000. (*Id*. at p. 1234.) There was no formal agreement extending the limitations period, nor was the statute equitably tolled, because "[i]t would not be reasonable for a landlord to assume that it could delay the onset of the statute of limitations indefinitely merely by agreeing to wait for the tenant to perform [its] contractual obligation." (*Ibid*.)

Plaintiff's complaint for breach of contract, initiated more than four and a half years after the claim accrued, is barred by the four-year limitations period. Because the breach of contract claim is time-barred, the claim for declaratory relief regarding that contract is also time-barred. (*Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal.2d 719, 734.)

V

Breach of Warranty

A. The Error Correction Theory

Plaintiff argues a new breach of warranty occurred with each failed attempt to fix the software problems. We disagree.

Plaintiff points out the EULA defines "Products" as meaning "all computer programs (whether provided in object code or source code form) only as delivered and licensed to You by [RPI], and (a) any improvements, *error corrections* [italics added], customizations or updates which [RPI] may provide to You . . . ."

Plaintiff argues that, because the EULA's 90-day warranty runs from "delivery" of the "product," and "product" includes "error corrections," each separate attempt to fix Version 9's problems was a new "delivery" triggering a new 90-day warranty that ran for 90 days after that attempted fix. Plaintiff argues this language means that, since RPI's

last attempted fix was November 10, 2009, its claim "accrued no earlier than November 10, 2015, as it was at that point that RPI last delivered an attempted error correction patch and was thus in breach of the EULA." We presume plaintiff means to say that the four-year limitations period expired no earlier than November 10, 2013.

The new theory fails because there were no error corrections. According to the complaint, nothing was ever corrected. Nor were there any improvements, customizations, or updates that would start a new 90-day warranty. There were only failed attempts to correct errors.

Plaintiff claims the "breach" here was the inability to provide a "fully functional product." Plaintiff contends that, because it relied upon representations that RPI could fix the problems, plaintiff could not and did not "discover" the "breach," i.e., inability to provide a fully functional product, until November 10, 2009, when RPI gave up. We reject this attempt by plaintiff, unsupported by any legal authority, to fit itself under the "future performance" refuge, which we address *post*. Moreover, this argument is really one of equitable estoppel rather than tolling (addressed *post*), for which plaintiff has failed to allege or argue that it can amend the complaint to allege that RPI lulled plaintiff into a false sense of security causing plaintiff to delay filing suit until it was too late. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383 (*Lantzy*) [estoppel prevents a defendant from pleading the very delay caused by his course of conduct].)

We reject plaintiff's "error correction" theory.

B. The Future Performance Theory

Plaintiff argues that, under the future performance provision of section 2725, plaintiff's cause of action did not accrue until plaintiff learned that RPI gave up trying to fix the software problems. We disagree.

Plaintiff argues its complaint is timely under the "future performance" provision of section 2725, subparagraph (2), which provides: "A breach of warranty occurs when

tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and *discovery of the breach must await the time of such performance* the cause of action accrues when the breach is or should have been discovered." (Italics added.) Plaintiff argues the "future performance" in this case consisted of RPI's multiple failed attempts to fix the software, and each failed attempt started a new limitations period under the EULA's limited warranty clause. Although the limited warranty clause is only for 90 days, plaintiff claims the attempts to fix the problems delayed accrual until RPI gave up nine months later. We conclude plaintiff's arguments lack merit.

This new theory, which is based on breach of warranty rather than breach of contract, strays from the complaint, which did not contain allegations about the limited warranty clause. And plaintiff fails to show it could amend the complaint to allege a viable warranty claim to avoid the limitations problem.

The EULA provides: "Limited Warranty - Retail Pro warrants that the diskette(s) or CD on which a Product is furnished and the Key(s) for the Product will be free from defects in materials and workmanship under normal use for a period of ninety (90) days after the date of your receipt of the Product. Additionally, Retail Pro warrants, for Your benefit alone, that for a period of ninety (90) days after the date of your receipt of the Product, the Product furnished will conform, in all material respects, to the specifications in the Documentation, a copy of which is attached hereto and incorporated herein, and that during such ninety (90) day period on written notice from You, Retail Pro will exercise commercially reasonable efforts to implement appropriate corrections to the Products. . . .

"[RPI's] entire liability and Your exclusive remedy for any breach of warranty or other claims or damages or liability with respect to the subject matter covered by the limited warranties set forth above shall be: (i) [RPI's] replacement of any diskette, CD or Key which does not meet [RPI's] limited warranty set forth above and which is returned

to [RPI]; and (ii) [RPI's] exercise of commercially reasonable efforts to implement appropriate corrections in response to Your notice of an error."

Although a breach of contract claim may be based on breach of warranty (*Cardinal, supra*, 169 Cal.App.4th at p. 135), the warranty clause in this case expressly limits remedies to replacement or reasonable efforts to repair. Here, the complaint clearly seeks damages for breach of contract. (Civ. Code, § 3300 [measure of damages for breach of contract includes all detriment proximately caused].) Plaintiff does not assert it wants to amend to seek the remedy for breach of the warranty clause (or to add a new declaratory relief claim to invalidate the remedy part of the limited warranty clause).

In any event, a warranty claim would not avoid the limitations problem.

Section 2725 limits delayed accrual for breach of warranty to situations where discovery of the breach must await the time of such performance. (§ 2725.) Here, plaintiff discovered the breach, i.e., knew that the software did not work, when installation was complete in February 2009, at which point the 90-day limited warranty period began to run. And plaintiff certainly gave RPI reasonable notice of breach of the warranty by May 2009 when it documented its complaints directly to RPI by letter, e-mail, and phone.

Accordingly, the four-year limitations began to run no later than May 2009 and expired before plaintiff filed suit in November 2013.

Plaintiff argues each failed attempt to fix the problems constituted a "future performance" that plaintiff could not have known when it received the software, thereby starting a new four-year limitations period under section 2725. We disagree. Section 2725 is clear on its face that "future performance" refers to performance of the product, not a seller's performance of an attempted repair. (§ 2725, subd. (2) ["where a warranty explicitly extends to *future performance of the goods* and discovery of the breach must await the time of *such performance*"].)

Cardinal, supra, 169 Cal.App.4th 116, held the "future performance" provision did not apply where a manufacturer of a medication dispenser alleged breach of contract against manufacturers of electrical connectors regarding defective spring probe connectors used in the dispenser. "Courts have interpreted this [section 2725's future performance] requirement to mean discovery of the breach 'must "*necessarily await*" such future performance.' [Citations.] In this case, Cardinal could have discovered the defective pins soon after the machines were delivered, and thus would know they would not work as promised. The determinative fact, for purposes of the 'must await' requirement, is that discovery is '*possible* prior to any specific future time.' [Citation.] The undisputed circumstances in this case show that it was possible to test the machines and determine the defect prior to waiting 50,000 mechanical cycles." (*Id.* 169 Cal.App.4th at p. 133.)

Here, the breach occurred and the cause of action accrued in early 2009 when the software was installed and did not work properly.

Plaintiff cites an inapposite case – *Krieger, supra,* 234 Cal.App.3d 205 -- involving a car buyer's lawsuit under the "lemon law" contained in the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.), after the car seller's unsuccessful attempts to repair the car's defects. Since the lemon law had no statute of limitations, *Krieger* applied section 2725 and found a triable issue of fact existed as to whether the complaint was timely under section 2725's future performance provision. (*Id.* 234 Cal.App.3d at pp. 214-215, 218-219.) But the *Krieger* reasoning was specific to the lemon law, which expressly requires a car seller to make, and a car buyer to allow, a reasonable number of attempts to fix defects. (*Krieger,* at p. 213, fn. 4, citing Civ. Code, § 1793.2, subds. (d)(1) and (e)(1).) "If we . . . held that a cause of action for breach of express warranty accrues on tender of delivery, before the seller has an opportunity to repair any defects, we would undermine the legislative purpose [of the lemon law] that the parties attempt to resolve any deficiencies in performance before resorting to the

remedies provided in the [Song-Beverly Consumer Warranty] Act." (*Krieger*, at pp. 218-219.)

This legislative purpose of the lemon law is not common to all lawsuits. To the contrary, there is "no . . . general principle in California law" that "*all* statutes of limitations are . . . tolled or suspended in progress while the parties make sincere efforts to adjust their differences short of litigation." (*Lantzy, supra*, 31 Cal.4th at p. 380 [statutory limitations period for construction defects is not subject to equitable tolling for repairs].)

Plaintiff fails to offer any analysis or authority for applying *Krieger*'s interpretation to a case not involving the lemon law. The Song-Beverly Consumer Warranty Act states in Civil Code section 1790.3 that its provisions "shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of this chapter, the provisions of this chapter shall prevail." Plaintiff fails to show any conflict.

We conclude "future performance" in section 2725 does not mean performance of attempted repairs.

C. The Tolling for Repairs Theory

Plaintiff argues that, even if section 2725's "future performance" provision does not apply to performance of repairs, the statute "does not alter the law on tolling of the statute of limitations" (§ 2725, subd. (4)), and we should therefore apply an equitable theory of "tolling [for] repairs," whereby the nine months of attempted repairs between early 2009 and November 9, 2009, would be tacked onto the four-year limitations period, making the complaint timely as having been filed four years and nine months after the breach/accrual in early 2009 when the newly installed software failed.

Even assuming for the sake of argument that section 2725 would accommodate a theory of equitable tolling for repairs, plaintiff has failed to adequately allege or propose amendment to allege such an equitable theory.

Plaintiff cites outdated or otherwise inapposite case law applying a "tolling [for] repairs" rule that a statute of limitations for breach of warranty does not begin to run until discovery of the defect, and is thereafter tolled during periods the warrantor claims he can honor the warranty by repairing the defect, and attempts to do so. (E.g., *Aced v. Hobbs-Sesack Plumbing Co*. (1961) 55 Cal.2d 573 [predated 1967 enactment of § 2725]; *Krieger, supra,* 234 Cal.App.3d 205 [tolling applied where "lemon law" governed reasonable repair attempts]; *Mack v. Hugh W. Comstock Associates, Inc*. (1964) 225 Cal.App.2d 583 [predated enactment of § 2725].)

Aced and *Mack* predated the 1967 enactment of section 2725, as noted in *Cardinal*: "When [California] adopted the Uniform Commercial Code version of the statute of limitations, it expressed the clear intent to follow the uniform rule which established tender of delivery as the accrual date, unless the plaintiff shows the warranty 'explicitly extends to future performance.' [Citation.]" (*Cardinal, supra*, 169 Cal.App.4th at p. 132; see also, *Lantzy, supra*, 31 Cal.4th at p. 372 [*Aced* and *Mack* inapposite because they predated enactment of limitations period for construction defects].)

California has not amended section 2725 to incorporate later amendments to the Uniform Code in 2003 addressing repair attempts: "For breach of a remedial promise, a right of action accrues when the remedial promise is not performed when performance is due." (Uniform Com. Code, § 2-725, subd. (2)(c), as amended in 2003.) "Remedial promise" is defined as "a promise by the seller to repair or replace goods or to refund all or part of the price of goods upon the happening of a specified event." (Uniform Com. Code, § 2-103, subd. (1)(n).)

Official Comment 9 to Uniform Commercial Code section 2-103 explains:

"The distinction between a remedial promise and a warranty that is made in this Article resolves a statute-of-limitations problem. Under [the] original Section 2-725, a right of action for breach of an express warranty accrued at the time the goods were tendered unless the warranty explicitly extended to the future performance of the goods. In that case, the statute of limitations began to run at the time of the discovery of the breach. By contrast, a right of action for breach of an ordinary (non-warranty) promise accrued when the promise was breached. A number of courts held that commitments by sellers to take remedial action in the event the goods proved to be defective during a specified period of time constituted a warranty, and in these cases the courts determined that the statute of limitations began to run at the time that the goods were tendered. *Other courts used strained reasoning that allowed them to apply the discovery rule even though the promise referred to the future performance of the seller and not the future performance of the goods*. [Italics added.]

"Under this Article, a promise by the seller to take remedial action is not a warranty at all and therefore the statute of limitations for a breach of a remedial promise does not begin to run at either the time the goods are tendered or at the time the breach is discovered. Section 2-275(2)(c) separately addresses the accrual of a right of action for a remedial promise. See Official Comment 3 to Section 2-725." (Uniform Commercial Code, § 2-103, Official Comment 9.)

In turn, Official Comment 3 to section 2-725, states: "Subsection (2)(c) provides that a cause of action for breach of a remedial promise accrues when the promise is not performed at the time performance is due."

The California Legislature has not amended section 2725 to conform to the Uniform Code amendments for breach of remedial promise. While enactment of section 2725 expressed the goal of a uniform limitations period for sales contracts for concerns doing business on a nationwide scale (Vol. 23A, Part 2, West's Annotated California Codes, *supra*, Commercial Code, § 2725, p. 155, Historical and Statutory Notes to

§ 2725, and Uniform Commercial Code Comment, p. 155), we are also mindful that there is "no . . . general principle in California law" that "*all* statutes of limitations are . . . tolled or suspended in progress while the parties make sincere efforts to adjust their differences short of litigation." (*Lantzy*, *supra*, 31 Cal.4th at p. 380.) *Lantzy*, which was decided in 2003, did not discuss the 2003 Uniform Code amendment adding "remedial promise."

In any event, plaintiff does not discuss the amended Uniform Code or offer any analysis supporting its application here. We therefore need not decide the matter. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [we need not address issue unsupported by legal or factual analysis].)

Nevertheless, even if we assume for the sake of argument that an adequate allegation of equitable tolling for repairs could toll the statute of limitations, plaintiff has not adequately alleged such a theory and fails to show it could. Plaintiff merely argues that, "because RPI both repeatedly represented to [plaintiff] that it would correct the errors with Version 9 and in fact attempted to correct such errors from the time installation was first attempted up to November 10, 2009, it cannot reasonably be argued that the statute of limitations should not have been tolled" until RPI gave up, and "to the extent that such a tolling analysis turns on reliance, such an issue is a question of fact and inappropriate for resolution on a demurrer."

We disagree.

Under California law, "application of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff." (*Addison v. California* (1978) 21 Cal.3d 313, 319.) While reliance is generally a question of fact, it can be decided as a question of law if reasonable minds could come to only one conclusion on the basis the facts alleged. (*Lantzy, supra*, 31 Cal.4th at pp. 385-387; *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.)

Here, equitable tolling was insufficiently alleged because there were no allegations that plaintiff's delay in filing suit in California was reasonable or in good faith, particularly since plaintiff did not delay in filing suit in Florida. Delay was unreasonable because the California complaint alleged the software never worked properly and caused immediate and continuous "devastating" losses to plaintiff. The allegations -- that repairs were attempted and that plaintiff was not "aware" that repair was "impossible" until RPI gave up -- were on their face insufficient to justify delay in filing suit, in light of the immediate and continuous losses allegedly sustained by plaintiff throughout the nine month period. Even if RPI could cure the defects, plaintiff would presumably be interested in recovering for damages already incurred.

Moreover, "[t]olling during a period of repairs generally rests upon the same legal basis as does [the distinct doctrine of] an estoppel to assert the statute of limitations, i.e., reliance by the plaintiff on the words or actions of the defendant that repairs will be made. [Citation.]" (*Cardinal, supra*, 169 Cal.App.4th at pp. 133-134 [defendant made no repair attempts, and third party's attempt to identify the problem did not help plaintiff avoid the limitations problem].) A defendant may be equitably estopped to assert the statute of limitations as a defense to an action if the defendant represents that all actionable damage will be repaired, thus making it unnecessary to sue; the plaintiff reasonably relies on this representation to refrain from bringing a timely action; the representation proves false after the limitations period has expired; and the plaintiff proceeds diligently once the truth is discovered. (*Lantzy*, *supra*, 31 Cal.4th at p. 384.)

Here, the complaint merely alleged that for nine months RPI said repairs would be "forthcoming" and would "all pan out," and plaintiff relied on those representations to not seek alternative software providers. The complaint contained no allegations of any words or actions by RPI asking plaintiff to delay filing suit, nor did the complaint allege that plaintiff refrained from filing suit in reliance on any such request by defendant, nor would any such reliance be reasonable under the facts alleged in the complaint (nine

months of failed attempts), nor did any such representation prove false only after the limitations period expired; nor did plaintiff diligently file suit after RPI gave up.

We conclude plaintiff's lawsuit is barred by the statute of limitations, and plaintiff fails to show any possibility of saving the complaint by amendment.

DISPOSITION

The judgment of dismissal is affirmed. RPI shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278.)

HULL, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.